Supreme Court, U.S.
FILED
FEB 15 1994
OFFICE OF THE CLERK

No. 93-1166

In The

Supreme Court of the United States

October Term, 1993

MIDWEST PRIDE V, INC.; MICHAEL F. MORAN; MICHELE MORAN; FRANK FINDO,

Petitioners,

vs.

STATE OF OHIO, EX REL. RICHARD G. WARD,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. WHETHER THE PATRONS OF AN ESTABLISHMENT THAT SELLS SEXUALLY ORIENTED VIDEOS, FILMS, BOOKS, MAGAZINES, NOVELTIES AND VARIOUS SEXUAL DEVISES AND ALSO PROVIDES AN ARCADE FOR THE VIEWING OF SUCH MATERIALS ARE ENGAGED IN CONDUCT WITH A SIGNIFICANT EXPRESSIVE ELEMENT WHEN THEY ENGAGE IN ACTS OF PUBLIC EXPOSURE OF PRIVATE PARTS OF THE ANATOMY, PUBLIC AND PRIVATE ACTS OF MASTURBATION AND ACTS OF SOLICITATION WHILE ON SUCH PREMISES THEREBY REQUIRING A FIRST AND FOURTEENTH AMENDMENT ANALYSIS OF THE APPLICATION OF A STATE NUISANCE LAW USED TO CLOSE THE PREMISE SOLELY BECAUSE OF THE MISCONDUCT OCCURRING ON THE PREMISES.

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STATEMENT OF THE CASE

On October 20, 1993, the Ohio Supreme Court declined to exercise its jurisdiction to review the decision of the Court of Appeals of Ohio, Fourth Appellate District, which is the basis of these proceedings. The Ohio Supreme Court ruled that the case involved no substantial constitutional question.

The proceedings below were commenced in accordance with the provision of Chapter 3767 of the Ohio Revised Code which provides a procedure for the closing of sexually oriented businesses if they are determined to

constitute public nuisances. Among other definitions that law defines a "nuisance" as a place in or upon which lewdness, assignation or prostitution is conducted, permitted or exists.

After a lengthy investigation of the Petitioners' premises in Ross County, Ohio, known as "The Lion's Den", the Ross County Prosecutor filed a verified complaint in the Common Pleas Court, alleging The Lion's Den was a public nuisance. Upon such filing an application for a temporary retraining order and an ex parte restraining order were filed as provided by the Ohio statutes. The Court directed the Ross County Sheriff to go to the premises and take an inventory of the premises constituting the alleged nuisance. In an effort to preserve evidence, the Court, in the temporary restraining order, permitted the taking of photographs of the premises as well as scientific testing to determine if The Lion's Den was a place in or upon which lewdness, assignation or prostitution was conducted, permitted, continued or existed.

On February 21, 1992, the Court issued a temporary injunction and on April 14, 1992, a permanent injunction. The trial court determined The Lion's Den to be a nuisance and that Petitioners were guilty of maintaining a nuisance. The Court further ruled that The Lion's Den should be closed for a period of one year.

On April 23, 1992, Petitioners filed a notice of appeal in the Fourth District Court of Appeals. On June 4, 1993, the Appellate Court affirmed the decision of the Ross County Court of Common Pleas.

Petitioners filed a Notice of Appeal to the Ohio Supreme Court on July 2, 1993, and on October 20, 1993,

the Ohio Supreme Court ruled that the case involved no substantial constitutional question and declined to accept jurisdiction.

STATEMENT OF FACTS

In their Petition, Petitioners misstate and mischaracterize the facts upon which the lower courts issued their decisions. Therefore Respondent sets forth the following factual summary.

In January of 1991, undercover officers from the Ross County Sheriff's Department and the South Central Ohio Task Force initiated an investigation of The Lion's Den. Undercover officers visited The Lion's Den on numerous occasions. In February of 1991, after the investigation had begun, there was an attempt to make The Lion's Den a "private club" by charging a single dollar for a membership. Even though membership was then required to enter, on at least one occasion an undercover detective entered the store without a membership card. One of the reasons for the change in membership policies was explained by a Lion's Den employee who thought that "the Sheriff's Department would have to notify them first before the Sheriff's Department entered and that the Sheriff would love to come in on them."

At trial an undercover officer described four (4) instances between January and September, 1991, when he entered The Lion's Den. He described his observations of the patrons of The Lion's Den masturbating and inserting their erect penises into holes common to adjoining viewing booths available on the premises. He described

observing apparent semen on the floor, benches and video screens. He also identified objects that he recovered from The Lion's Den that were taken to the State's forensic laboratory for analysis.

A forensic scientist testified that she examined the evidence seized at The Lion's Den for the presence of semen. She submitted the seized evidence to a "mapping" procedure to detect the presence or absence of semen and concluded that the tests indicated the presence of semen on the evidence submitted by the undercover officer.

Another officer testified concerning his observations on eleven (11) separate undercover visits to The Lion's Den. On nine (9) of those visits he observed The Lion's Den patrons in acts of masturbation. He also described the various activities he observed relating to the common holes between the viewing booths. The observed subjects inserting their penises through the holes; he observed an individual press his bare buttocks against the hole; and he observed another subject take his clothes off, place his mouth to the hole and rub the hole with his tongue. This officer also described an occasion when one of The Lion's Den patrons invited him to engage in sexual activity.

The same officer also described the apparent presence of semen, wet and dry, in various locations in The Lion's Den. Photographs, some aided by the use of a "black light," confirmed massive stains, spots and streaks of apparent semen throughout The Lion's Den premises.

During the evidentiary hearing Petitioners called only one witness, the Prosecuting Attorney. During this hearing the Petitioners did not introduce any evidence that contradicted any of the factual allegations made by

Respondent. The trial court concluded that the retail and arcade areas of the store were openly contiguous with each other and were not separated from each other. The trial court, in its Amended Judgment Entry, specifically concluded that the Lion's Den was one operating entity, one business, located in one building. (Amended Judgment Entry at p. 44a, Appendix, Petitioners' Brief) More specifically, the trial court in its Findings of Fact, determined that

> admission to all areas of the store is controlled by a cashier and/or manager located at the entry to the premises and within the retail area of the store. The retail and private viewing (arcade) areas are openly contiguous with each other and are not separated from each other.

The Court stated that

> this nuisance action was predicated upon sexual activity occurring on the bookstore premises. . . . Such activity is not protected expression and therefore there is no unconstitutional infringement of free speech.

The Lion's Den was then held to be a nuisance as defined by Section 3767.01(C) and was ordered closed for a period of one year.

ARGUMENT

The facts presented in these proceedings are almost identical to the facts presented to this Court in *Arcara vs. Cloud Books, Inc.*, 478 U.S. 697 (1986). The Petitioners in these proceedings operate "The Lion's Den," a business that sells sexually oriented materials, including videos,

books and other devices and also had available on the premises an arcade for the viewing of sexually explicit movies. No issue is presented as to whether the videos or books are obscene, pornographic materials.

In the course of a law enforcement investigation, undercover officers personally observed instances of masturbation and evidence of masturbation by patrons. Some of the video booths shared common holes between them, and the officers observed patrons inserting their penises through these holes into adjoining booths on multiple occasions. One officer was solicited by a patron to engage in sexual activity.

This Court, in *Arcara*, concluded that the conduct in that case, which is almost identical to the conduct in the instant case, "manifest[ed] absolutely no element of protected expression." *Arcara*, 478 U.S. at 704.

Petitioners claim that the patrons' acts of masturbation occurred while the patrons were viewing sexually explicit videos thereby intimately associating non-speech conduct (i.e. masturbation) with speech being disseminated on the premises. This view was specifically rejected by both the trial and appellate courts below. The trial court specifically held that the

> nuisance action was predicated upon sexual activity occurring on the bookstore premises. Such activity is not protected expression. . . . Elements of protected speech are not involved, and therefore there is unconstitutional infringement of free speech.

Similarly, the appellate court rejected the Petitioners' claims concluding that "the sexual activities which gave

rise to the nuisance complaint filed herein contain no element of protected expression," a view in accord with the United States Supreme Court holding in *Arcara vs. Cloud Books, Inc.*, 478 U.S. (1986). (Decision and Judgment Entry of Court of Appeals at p. 10a, Appendix, Petitioners' Brief).

Petitioners argue that because the sexual conduct regulated by the nuisance action is so closely intertwined with protected speech, the First Amendment of the United State Constitution required the trial court to employ the least restrictive test of *United States vs. O'Brien* (1968), 391 U.S. 367. In *O'Brien* this Court created a four-part test to be used where "speech" and "non-speech" elements combine in the same course of conduct. The trial court and the appellate court after finding that the regulated conduct in the instant case manifested absolutely no element of protected expression, concluded further that if the *O'Brien* test were to be applied, it was satisfied.

Petitioners grossly misstate the facts in their analysis of this issue. They predicate their "least restrictive" argument upon their factual statement that The Lion's Den business premises was "composed of two separate and identifiable areas." (Petitioners' Brief at page 21) In fact, the trial court found that the enterprise consisted of "one operating entity, one business, located in the building." (Judgment Entry at p. 44a, Appendix, Petitioners' Brief) The trial court found further that the two areas of the establishment were not adequately separated to permit the premises to remain open without the risk of the continuing sexual conduct.

In the proceedings below, the government was not regulating speech or conduct with a significant expressive element. Conceivably every governmental action can be construed to have some effect upon speech or expression. This Court clearly drew the line of First Amendment implication in *Arcara* when it reasoned that:

> It is true that the closure order in this case would require respondents to move their bookselling business to another location. Yet we have not traditionally subjected every criminal and civil sanction imposed through legal process to "least restrictive means" scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was *conduct with a significant expressive element that drew the legal remedy in the first place*, as in *O'Brien*, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in *Minneapolis Star*. This case involves neither situation, and we conclude the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books. (Emphasis added.)

Even if the First Amendment were to be implicated, the trial court and the Court of Appeals considered the application of the *O'Brien* test and concluded that if the *O'Brien* test were to be applied, it was satisfied.

CONCLUSION

It is respectfully submitted that Petitioners have failed to establish any reason why the writ should be granted. The decision below did not involve questions of federal law which have not been, but should be, settled by this Court, nor did it decide a federal question in a way that conflicts with applicable decisions of this Court. It is respectfully submitted that the Petition for A Writ of Certiorari should be denied.

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